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January 26, 2001

Mark J. Langer, Esq.
Clerk of the Court
United States Court of Appeals for the
District of Columbia Circuit
333 Constitution Avenue, NW - Room 5423
Washington, DC 20001-2866

Re: United States v. Microsoft Corp., No. 00-5212 (consolidated with 00-5213)
Corrected Brief of Laura Bennett Peterson, Amicus Curiae

Dear Mr. Langer:

Kindly allow me to note that the Table of Contents and Table of Authorities in the above-referenced brief contain incorrect page references, as does page 18. I apologize for these errors. The errata that are thus appropriate reflect the circumstances described in my January 22nd motion for leave to file out of time and technical (especially formatting) difficulties.

I provide page ii (Table of Contents) and pages iii-vii (Table of Authorities) with corrected page references. On the corrected page 18 (also provided), the second full paragraph replaces "See Argument I at 5-16 supra" with "See Argument I at 5-15 supra." The same paragraph replaces "See Argument II at 16-18 supra" with "See Argument II at 15-18 supra."

Let me note, too, the following errata to pages 8 and 21 of the above-referenced brief:

-- On page 8, the second full sentence in the last paragraph of text should read: "Other courts have adopted different hallmarks or definitions of entry barriers." This replaces "Other courts have adopted a different hallmark or definition of an entry barrier."

-- On page 21, immediately after the second indented, single-spaced quote, the citation to General Motors should read "General Motors, supra, 384 U.S. at 141 n.16 (emphasis in original)." This replaces "Id. at 141 n. 16 (emphasis in original)."

Finally, I note, in accordance with my discussion with Mr. John Haley in your office on January 23, that the forthcoming articles to which I cite in footnote 3, at page 6 (by Professors

Elzinga et al.), and footnote 14, at page 17 (by Professor Rotunda), will be provided to the Court and the parties only should the Court so request. Therefore, the explanatory parenthetical ("copy provided to the Court and parties") after the date of the draft in each of these footnotes is deleted.

Accordingly, I enclose for the Court nineteen copies of this letter, appending hereto and to those copies corrected pages ii-vii, 6, 8, 17, 18, and 21, and an amendment to the certificate of service page, for the above-referenced brief.

This letter and its attachments, and the other documents I filed separately with the Court this week (as discussed earlier with Mr. Haley), will also be filed electronically as soon as possible, but in no event later than the morning of Monday, January 29, 2001.

I regret the inconvenience and appreciate your assistance.

Sincerely,

Laura Bennett Peterson

cc: Mr. John Haley, office of Clerk of the Court
Counsel listed in attached amendment to certificate of service

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TABLE OF AUTHORITIES

(Authorities on which I principally rely are marked with asterisks.)

Cases **Pages**

[CORRECTED P. iv, PETERSON BRIEF, PER 1/26/01 LETTER TO COURT]

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Statutes and Rules

Treatises & Other Authorities

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new entry, the less power existing firms have." Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) (Easterbrook, J.). "In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time." United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.). Although the district court finds that Microsoft enjoys "monopoly power," the Complaint does not allege, and the court does not find, that Microsoft obtained this power by illegal means. The finding of monopoly power is based on dated estimates and projections (published more than two years before the findings themselves) of an unduly narrowly defined market[3] -- the market for Intel-compatible personal computer (PC) operating systems, Findings, supra, 84 F. Supp. 2d at 14 (¶ 18) -- together with the "applications barrier to entry." "Microsoft's dominant market share is protected by a high [applications] barrier to entry. . . . [L]argely as a result of that barrier, Microsoft's customers lack a commercially viable alternative to Windows." Id. at 19 (¶ 34).

Oddly enough, this barrier is nowhere defined by the district court, even though it plays such a crucial role in the court's analysis. See id. at 19-22 (¶¶ 36-44) ("Description of the Applications Barrier to Entry"); "Conclusions," supra, 87 F. Supp. 2d at 36-37. More oddly still, none of the academic economists who submit declarations in support of the governments' remedy define what they mean by the "applications" – or any – "barrier to entry"; they simply rely uncritically on the district court's formulation. See Declaration of Rebecca M. Henderson [hereinafter "Henderson Decl."] ¶¶ 6, 42); Declaration of Paul M. Romer [hereinafter "Romer

[3] For a critique of, among other things, the court's definition of the relevant market, see Robert A. Levy and Alan Reynolds, Microsoft's Appealing Case, Cato Institute Policy Analysis No. 385, at 7-11 (Nov. 9, 2000).

Kenneth G. Elzinga, David S. Evans, and Albert L. Nichols analyze the remedy, including (at 45-51) logical inconsistencies between Appellees' theories on liability and their theories on remedy, in U.S. v. Microsoft: Remedy or Malady? (forthcoming article, George Mason Law Review; Nov. 21, 2000 draft).

these intrinsic or natural features of certain computer software markets -- which may explain the emergence, at least temporarily, of leading firms in certain segments -- constitute or contribute to barriers to entry.

The court had suggested, in deciding Microsoft's summary judgment motion, a distinction between natural and artificial entry barriers:

> Plaintiffs concede that Microsoft's dominance in the operating system market does not, by itself, warrant concern. There is no reason to believe that the market, left to itself, will not generate alternatives to Windows, despite the high barriers to entry. . . . The antitrust laws are implicated, however, if it can be shown that Microsoft constructed *artificial* entry barriers that further restrict the naturally difficult task of providing alternatives to Microsoft's operating system.

United States v. Microsoft, supra, 1998-2 Trade Cas. (CCH) ¶ 72,261, at 82,672 (emphasis in original).[6] But the "naturally difficult task" of providing an alternative to Windows -- especially under conditions of increasing returns to scale and network economies -- is no more a barrier to entry than the "natural monopoly" this Court recognized in United Distribution Cos. v. Federal Energy Regulatory Comm'n [FERC], 88 F.3d 1105, 1122 n.4 (D.C. Cir. 1996), cert. denied *sub nom.* Associated Gas Distribs. v. FERC, 520 U.S. 1224 (1997), or the natural monopoly or "superior skill, foresight, and industry" Judge Hand noted in United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

"The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier." Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1428 (9th Cir. 1993), cert. denied, 510 U.S. 1197 (1994). Other courts have adopted different hallmarks or definitions of entry barriers. See generally IIA Phillip E. Areeda et al., Antitrust Law ¶¶ 420-22, at 55-77 (1995). Judge Posner observes:

[6] This distinction, from which the court departs in its findings, is imperfect but an improvement over the sweeping condemnation of all supposed "entry barriers."

restructuring, which . . . makes competition more likely in the future by reducing barriers to entry in the operating system market, is thus appropriately and precisely related to the violation found by the Court." Plaintiffs' Reply Mem. in Support of Proposed Final Judgment at 20 (May 17, 2000). The claim is hollow and one is left with "a definite and firm conviction that a mistake has been committed." Gypsum, supra, 333 U.S. at 395.

As Wright and Miller explain:

> [R]espect for the findings by the trial court cannot be pressed too far. . . . If the findings are against the clear weight of the evidence or the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the appellate court will set the findings aside even though there is evidence supporting them that, by itself, would be considered substantial.

9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2585, at 567, 577 (1995).

To make matters murkier, the district court eschewed citations to the record and specifications of when any particular finding turned on credibility judgments. The court provided only a catchall reference to its consideration of "the credibility of the testimony of the witnesses, both written and oral," and other factors. Findings, supra, 84 F. Supp. 2d at 12. It is noteworthy that the Gypsum Court set aside findings as clearly erroneous "[d]espite the opportunity of the trial court to appraise the credibility of the witnesses" in that antitrust conspiracy case. Gypsum, supra, 333 U.S. at 396. "[T]he court of appeals may well find clear error even in a finding purportedly based on a credibility determination." Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985).

The findings here also warrant heightened scrutiny insofar as they reflect, or may reasonably be seen to reflect, bias or prejudgment. See Microsoft's Brief at 146-150.[14] In

[14] See also Ronald D. Rotunda, Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions -- A Case Study of the Microsoft Litigation, 2001 U. Ill. L. Rev. (No. 2, 2001) (forthcoming; Dec. 15, 2000 draft); Judge Jackson's Remarks, Washington Post, Jan. 16, 2001, at A20, col. 1 (editorial stating that his comments about the Microsoft litigation "cross the line" and "do not instill confidence in the judge's impartiality."

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Justice Rehnquist's words: "Presumably any doctrine of 'independent review' of facts exists . . . so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 518 (1984) (dissenting opinion joined by Justice O'Connor).

III. The District Court's Findings Involve Mixed Questions of Law and Fact and Do Not Meet the Applicable de Novo Standard of Review.

The district court erroneously concluded that Microsoft's combination of Internet Explorer with Windows is a tying arrangement in violation of Section One of the Sherman Act, 15 U.S.C. § 1, and that Microsoft has illegally maintained a monopoly in Intel-compatible PC operating systems, and attempted to monopolize a browser market, in violation of Section Two of the Sherman Act, 15 U.S.C. § 2. These erroneous conclusions sprang from two types of mistakes:

First, the district court erred substantively by getting both the economics wrong and the law wrong. The court incorrectly analyzed economic concepts critical to its theory of the case. See Argument I at 5-15 supra. For this reason alone, its findings, particularly with respect to the "applications barrier to entry," are fundamentally flawed and clearly erroneous. See Argument II at 15-18 supra. The court also applied incorrect legal standards to its analysis of the purpose, nature, and effect of Microsoft's conduct.

I concur in this latter regard with Microsoft's analysis of the proper legal standards. See Microsoft's Brief at 69-125. I add that the district court seems consistently to confuse (a) natural and lawful "monopolies" or market "imperfections" with artificially or illegally maintained monopolies and monopolization, (b) efficient, independently profit-maximizing acts or practices, taken or adopted for legitimate business purposes, with coercion and predation, and (c) injury to

> primary facts in the case. . . . [E]ven that final determination of legal consequences is a process of law declaration, for it indicates the legal consequences that attend a particular set of primary facts.

II Phillip E. Areeda et al., Antitrust Law: An Analysis of Economic Principles and Their Application ¶ 306, at 57-58 (2d ed. 2000). See also Kenneth Culp Davis & Richard J. Pierce, Jr., II Administrative Law Treatise § 10.6, at 154 (3d ed. 1994) ("Appellate court judges resolve issues of legislative fact routinely in the process of interpreting and applying the typically broad language of statutes. The antitrust laws illustrate this phenomenon particularly well."); Stephen A. Weiner, The Civil Nonjury Trial and the Law-Fact Distinction, 55 Cal. L. Rev. 1020, 1041, 1056 (1967) (urging "free reviewability [of] the product of applying law to fact" and arguing that his conclusions about the desirable scope of appellate review in non-jury negligence cases "are relevant to other cases, particularly those which state the controlling principle of law as a general standard of reasonableness").

Mixed questions of law and fact have weighed heavily in several major antitrust cases. In United States v. General Motors, the district court's ultimate conclusion that there was no conspiracy in violation of Section One of the Sherman Act "cannot be squared with its own specific findings of fact." General Motors, supra, 384 U.S. at 140. The Court went on to say:

> [T]he ultimate conclusion by the trial judge . . . is not to be shielded by the "clearly erroneous" test embodied in Rule 52(a) . . . . [citing the Rule and United States v. Parke, Davis & Co., 362 U.S. 29, 44-45 (1960)]. As in Parke, Davis, . . . the question here is not one of "fact," but consists rather of the legal standard required to be applied to the undisputed facts of the case [citing another important antitrust case, United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963)].
>
> In any event, we resort to the record not to contradict the trial court's findings of *fact*, as distinguished from its conclusory "findings," but to supplement the court's factual findings and to assist us in determining whether they support the court's ultimate legal conclusion that there was no conspiracy.

General Motors, supra, 384 U.S. at 141 n.16 (emphasis in original). In Gypsum, moreover, the Court carefully evaluated the backdrop against which most of the government's witnesses had,

on cross-examination, denied concerted activity. See Gypsum, supra, 333 U.S. at 395-96. "Where such testimony is in

AMENDMENT TO CERTIFICATE OF SERVICE,
CORRECTED BRIEF OF LAURA BENNETT PETERSON, AMICUS CURIAE

I hereby certify that on this 26th day of January, 2001, I served a copy of the foregoing letter of Laura Bennett Peterson, Amicus Curiae, to Mark J. Langer, Esq., Clerk of the Court, attaching corrected pages, as described in this letter, ii (Table of Contents), iii-vii (Table of Authorities), 6, 8, 17, 18, and 21 of the Corrected Brief of Laura Bennett Peterson, Amicus Curiae, on: (1) a listed counsel for each of the participants identified in the Certificate of Service submitted with the Brief for Appellees United States and the State Plaintiffs (Messrs. Smith, Boe, Falk, Black, Cohen, Getman, Bork, and Burton), at the addresses provided therein, (2) on the other individual amici (Messrs. Lundgren and Hollaar) identified therein, at the addresses therein, and (3) on the following additional counsel identified, at the listed addresses, in the Certificate of Service submitted with the Brief for Defendant-Appellant Microsoft: Ms. O'Sullivan and Mr. Schwartz.

I have served the above-mentioned letter and attachments by facsimile with the following exceptions: Messrs. Burton, Getman, Hollaar, and Lundgren have, with their consent, been served by first-class mail only.

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Laura Bennett Peterson